Supreme Court of the United States

OCTOBER TERM, 1945

No. 512

Joseph D. McGoldrick, Comptroller of the City of New York, and Albertino Portolio, Treasurer of the City of New York,

Petitioners,

against

John T. Clark & Son,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

October 17, 1945.

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Supreme Court of the United States

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No.

JOSEPH D. MCGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

JOHN T. CLARK & SON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

To the Honorable the Supreme Court of the United States:

The petition of Joseph D. McGoldrick, Comptroller of the City of New York, and Almerindo Portfolio, Treasurer of the City of New York, respectfully shows:

1. Your petitioners are the Comptroller and Treasurer, respectively, of the City of New York, charged by law with the duty of administering and enforcing the tax laws here involved. The petition seeks review of a decision of the Court of Appeals of the State of New York holding that by virtue of the Commerce Clause of the United States Constitution (Art. 1, §8, cl. 3) the New York City general business tax may not be imposed upon respondent's gross receipts from its stevedoring activities carried on exclusively within the territorial limits of the City of New

York. The Court of Appeals stated in its decision that in deciding the matter this federal constitutional question was presented and necessarily passed upon by it (R. 183).

2. A companion case involving exactly the same question, *Matter of Carter & Weekes Stevedoring Company* v. *McGoldrick*, 294 N. Y. 906 (1945), was decided simultaneously with the present case. A petition for certiorari in that case is being presented together with the present petition.

Jurisdiction and Timeliness

3. The petition for certiorari is made under 28 U. S. C. A. §344, subd. (b), and the Court has jurisdiction to grant the writ. *McGoldrick* v. *Compagnie Generale Transatlantique*, 307 U. S. 620 (1939); *McGoldrick* v. *Berwind-White Coal Mining Co.*, 308 U. S. 546 (1939); *McGoldrick* v. *Gulf Oil Corp.*, 308 U. S. 545 (1939).

4. The decision of the Court of Appeals was handed down on July 19, 1945 (294 N. Y. 908). On or about August 11, 1945, the remittitur was filed in the office of the County Clerk of New York County, who is the Clerk of the Supreme Court of the State of New York, New York County, and accordingly the remittitur is in the custody of the Supreme Court. A final order of the Supreme Court, New York County, was entered upon the remittitur on August 14, 1945. This petition is being presented within three months of the date of the decision of the Court of Appeals and is therefore timely. *Dept. of Banking* v. *Pink*, 317 U. S. 264 (1942).

5. The decision of the Court of Appeals was based solely on the ground that the tax as applied violated the Commerce Clause of the federal Constitution (R. 183). At the hearing before the petitioner-Comptroller upon the application of the taxpayer (respondent here) for refund of

general business tax paid, the taxpayer raised this ground of objection to the tax relying on the decision of this Court in *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937) (R. 24-26, 89, 93, 97, 101). Thereafter it was again raised in the proceeding brought by the respondent in the Appellate Division of the Supreme Court, First Department, to review the Comptroller's final determination denying its application for refund (R. 11). The Appellate Division sustained the objection and annulled the Comptroller's determination and directed that the taxes in question be refunded to the respondent on the authority of the *Puget Sound* case, *supra* (R. 181). Upon appeal by petitioners to the Court of Appeals, this federal question was the only one presented. The Court of Appeals affirmed, saying: "A question under the Constitution of the United States was presented and necessarily passed upon" (294 N. Y. 908).

The Statutes, the Validity of Which Is Involved

6. The statutes, the constitutionality of which is involved, are the New York City general business and financial tax laws for the years 1938 to 1941, Local Laws No. 20 of 1938, No. 103 of 1939, No. 78 of 1940 and No. 47 of 1941 (constituting Titles O, R and RR of Chapter 41 of the Administrative Code of the City of New York). The first three of these local laws were enacted pursuant to Laws of New York of 1934, ch. 873, as annually amended, which conferred upon the City of New York authority to impose taxes such as the State itself might impose, including a general business tax on gross receipts. Since 1941 the authority of the City to impose this type of tax derived from Article 2-B of the General City Law of the State of New York, which was added to the General City Law by Laws of New York of 1941, ch. 199. So far as a general business tax on gross receipts is concerned, Article 2-B conferred upon the City of New York the same authority as was theretofore conferred by Laws of New York of 1934,

ch. 873. Local laws imposing these taxes have been and continue to be renewed and extended annually up to the present time, pursuant to the State enabling acts authorizing them.

The provisions of Local Law No. 78 of 1940 (Title R of Chapter 41 of the Administrative Code) are printed as Appendix A. So far as the issues here involved are concerned, these provisions are substantially the same as the provisions of the other local laws involved. The provisions of the State enabling act, pursuant to which that local law was enacted (Laws of New York of 1940, ch. 245, amending Laws of New York of 1934, ch. 873), are printed as Appendix B. The provisions of this Act were somewhat different when the 1938 local law was enacted, the changes being necessitated by new provisions in the New York State Constitution, effective January 1, 1939, which changes did not, and do not in any way affect the questions raised and presented in this case. The enabling act for 1941 (Article 2-B of the General City Law) above referred to, prescribes a model general business tax law which the City is authorized to adopt. This model law was copied practically verbatim from New York City's general business tax law set out in Appendix A. The provisions of Article 2-B, except for the model law, are set forth as Appendix C.

Opinions Below

7. The memorandum opinion of the Appellate Division is reported in 269 App. Div. 685 (1945), and reads as follows:

> "Determination of the Comptroller of the City of New York unanimously annulled, with $50 costs and disbursements to the petitioner, and the respondents directed to refund petitioner's deposit, with interest on the authority of Puget Sound Stevedoring Co. v. Tax Commission (302 U. S. 90). Settle order on notice."

The memorandum affirmance of the Court of Appeals is reported in 294 N. Y. 908.

Summary Statement of the Matter Involved

8. The City general business tax is imposed without discrimination upon all persons engaged in or carrying on within the City any trade, business or profession. Under the first three local laws involved it was imposed at the rate of 1/10%, and under the 1941 law and thereafter at the rate of 1/20%, on gross receipts received in or by reason of any sale made or service rendered within the City.

The taxpayer is a corporation with its principal office in the City of New York, engaged in the general stevedoring business consisting of loading and unloading ships' cargoes and the contents of railroad freight cars moving in interstate and foreign commerce, and in performing other incidental services such as cleaning of docks, passenger waiting rooms, and the offices of the steamship companies it serves. All taxpayer's activities are performed within the City of New York except a very small portion of its services (yielding a tax of $488.36 out of a total tax of $4,770.23), which are performed in New Jersey.

The petitioners did not in the Courts below and do not here press the issue of the taxability of the New Jersey services. The petitioners limit themselves here as they did in the Courts below solely to the question of the taxability of the respondent on the activities performed wholly within the territorial limits of the City of New York and upon its receipts from those activities. The receipts cover only the taxpayer's own activities and nothing more. Since none of the activities sought to be taxed is carried on outside the territorial limits of the City, the taxpayer could not be subjected to tax on these activities or these receipts by any other state. If the taxpayer is exempted from the City general business tax, it would be free of all tax on its receipts from these activities carried on exclusively within the City of New York.

Question Presented

9. The following question is presented in this case: Does the New York City general business tax imposed upon the respondent's receipts from its stevedoring activities carried on wholly within the territorial limits of the City of New York constitute an unconstitutional burden on interstate commerce?

Assignment of Errors

10. It is submitted that the Court of Appeals erred:

(a) In failing to hold that the City general business tax was validly imposed upon respondent's receipts here involved, under the recent decisions of this Court starting with *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), cited in the brief annexed hereto at page 12, *infra*.

(b) In following the decision of this Court in *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937), and accepting the holding in that case rather than the more recent principles enunciated by this Court in the cases above referred to, as controlling on the question of the validity under the Commerce Clause of the City general business tax as applied to the respondent.

(c) In holding that the City general business tax as applied to respondent's receipts from its stevedoring activities here sought to be taxed constituted an unconstitutional burden on interstate commerce.

(d) In regarding itself as compelled by the Commerce Clause to affirm the determination of the Appellate Division and to annul the Comptroller's determination denying petitioner's application for refund of

City general business taxes paid by it on its receipts from its stevedoring activities carried on wholly within the territorial limits of the City.

Reasons for Allowance of the Writ

11. The reasons relied on by petitioners for allowance of the writ are as follows:

(a) In holding the City general business tax law as applied to respondent's receipts from its wholly intracity stevedoring activities to be an unconstitutional burden on interstate commerce, the Court of Appeals has decided a federal question of substance in a way not in accord with the applicable decisions of this Court cited in the accompanying brief, for the Court of Appeals has held invalid a tax upon gross receipts received from interstate commerce which (1) does not in any way discriminate against or otherwise burden interstate commerce; and (2) is measured by gross receipts derived solely and exclusively from activities which do not extend beyond the territorial limits of the City of New York.

(b) This case and its companion case are test cases upon the outcome of which depend many other cases involving substantially the same question. New York City is the foremost port, transportation and commercial center in the country. There are many and a great variety of substantial business concerns within the City engaged in promoting, servicing and transporting and delivering goods and passengers in interstate and foreign commerce, whose activities are, either wholly, or to a substantial degree, carried on within the territorial limits of this City. These include stevedores, passenger and freight agents, selling and marketing agents, *etc.* The receipts from these businesses run into substantial sums and the general business tax on those receipts is of considerable consequence.

(c) Respondent and other persons engaged in wholly local activities connected with or contributing to interstate and foreign commerce enjoy all the benefits, advantages and services afforded and provided by the City of New York that are enjoyed by other persons carrying on business within the City unconnected with such commerce. The tax involved being limited to wholly local activity, it cannot possibly be duplicated in any other jurisdiction. Hence, the effect of the decision of the Court of Appeals is to exempt persons engaged in wholly local businesses connected with interstate commerce, from contributing a just share toward the cost of maintaining and furnishing local governmental services which they enjoy, and to transfer the whole load to other local businesses. The Commerce Clause was not intended to confer such preferences, and it should not be interpreted to yield such a result.

(d) The decision of this Court in *Puget Sound Co. v. Tax Commission, supra,* has in effect been overruled by later cases involving the question of the effect of the Commerce Clause upon the taxing power of the States, cited in the attached brief, at page 12, *infra*, particularly *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434 (1939), which involved the liability of a taxpayer engaged, as was the Puget Sound Stevedoring Company, in rendering services connected with the shipment and sale of merchandise in interstate commerce (*i.e.*, not a person shipping his own merchandise), under the same Washington gross receipts tax as was involved in the *Puget Sound* case. The States and localities should know the extent to which they may apply the general principles and doctrines enunciated by this Court in the *Western Live Stock* and subsequent cases in that line, and whether the *Puget Sound* case represents a limitation upon those doctrines.

WHEREFORE, petitioners pray that a writ of certiorari may be issued out of and under the seal of this Court directed to the Supreme Court of the State of New York in and for the County of New York commanding that Court to certify

and send to this Court on a day certain to be therein designated a full and complete transcript of the record and all proceedings of the said Court in this cause to the end that the case may be reviewed and determined in this Court as provided in 28 U. S. C. A. §344(b); and that the final order and judgment of the said Court and every part thereof may be reviewed and corrected by this Court in conformity with the Constitution and Laws of the United States and that the said final order and judgment may be reversed and the Comptroller's original determination denying the respondent's application for refund reinstated; and petitioners pray for such other and further relief as to this Court may seem just and proper, and the petitioners will ever pray.

Dated: New York, N. Y., October 17, 1945.

JOSEPH D. MCGOLDRICK,
Comptroller of the City of New York,

and

ALMERINDO PORTEOLIO,
Treasurer of the City of New York,
Petitioners.

by ISAAC C. DONNER,
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Supreme Court of the United States

OCTOBER TERM, 1945

No.

JOSEPH D. MCGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

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JOHN T. CLARK & SON,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Statement of the Case

The respondent is a New York corporation engaged in the business of general stevedoring, which consists of loading and unloading ships' cargoes and the contents of railroad freight cars, moving in interstate and foreign commerce (R. 27-28, 63-64), and the performance of other services, such as cleaning of docks, passenger waiting rooms, and the offices of the steamship companies it serves (R. 79). Its sole office is in the City of New York (R. 67) and all its activities here involved * are performed solely and ex-

* As stated at page 5, *supra*, a very small portion of the taxpayer's stevedoring services are performed in New Jersey, but the tax on the receipts from those services is not in issue here. As to the New Jersey services, the City did not press the issue of their taxability in the Courts below, and does not do so now, but limits itself in this case solely to the taxability of respondent on its activities wholly within the City of New York.

clusively within the territorial limits of the City of New York (R. 71-73, 82). None of those activities, nor any part of them, is carried on outside the territorial limits of the City. All of the respondent's contracts for its services are made in New York City (R. 67). Its shops for the repair of its machinery are located in the City (R. 67). The taxpayer is paid by its customers, *i.e.*, the steamship companies, only for its stevedoring services and only these receipts from its own activities in the City are sought to be taxed (R. 32, 40, 41-43).

The New York City general business tax law imposes a tax upon all persons "carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity" (Title R, chapter 41 of the Administrative Code, §R41-2.0). Under the local laws of 1938, 1939 and 1940, it was imposed at the rate of 1/10%, and since 1941 at the rate of 1/20%, on all receipts "received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity" (§R41-2.0). Receipts are defined as "the gross receipts received in or by reason of any sale made or services rendered or commercial or business transaction had in the city" (§R41-1.0, par. 3). The City general business tax law has a further provision (§R41-2.0, par. b) to cover situations where a receipt cannot validly be taxed in its entirety by reason of the provisions of the Constitution of the United States or otherwise. This provision authorizes the Comptroller to provide for allocation of such receipts so as to subject to tax only such part thereof as is properly attributable to the business done within the City. This provision does not directly affect respondent.

Jurisdictional Statement and Assignment of Errors

The Court will find these respectively at pages 2 and 6 of the petition, *supra*.

POINT I

Under the principles enunciated in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), and an unbroken line of later cases the tax imposed upon respondent's gross receipts from its activities carried on exclusively within the City of New York is clearly valid under the Commerce Clause.

Respondent's objection to the tax (R. 24), and the decisions of the Courts below rested solely upon *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937). That case, insofar as it held invalid under the Commerce Clause a State tax on gross receipts from wholly local activities connected with interstate commerce, is at variance and irreconcilable with the numerous later decisions of this Court on that question.

Western Live Stock v. *Bureau of Revenue*, 303 U. S. 250 (1938);
Coverdale v. *Pipeline Co.*, 303 U. S. 604 (1938);
Adams Mfg. Co. v. *Storen*, 304 U. S. 307 (1938);
Gwin, White & Prince, Inc. v. *Henneford*, 305 U. S. 434 (1939);
McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940);
Dept. of Treasury v. *Wood Preserving Corp.*, 313 U. S. 62 (1941);
Dept. of Treasury v. *Ingram-Richardson Mfg. Co.*, 313 U. S. 252 (1941);
Allied Mills, Inc. v. *Dept. of Treasury*, 318 U. S. 740 (1943); aff'g *per curiam* 220 Ind. 340, 42 N. E. 2d 34 (1942);
International Harvester Co. v. *Dept. of Treasury*, 322 U. S. 340 (1944).

The principles enunciated in these cases should be applied to the case at bar. This requires a reversal of the Court below.

The holding in the *Puget Sound* case

The *Puget Sound* case involved a gross receipts tax on wholly local stevedoring activities, as does the case at bar. The fact that stevedoring is involved in both cases is probably why the *Puget Sound* case was considered controlling by the Courts below.* This fact, however, is purely incidental, merely establishing that interstate commerce was involved. The real question was the effect of the Commerce Clause on the right of States to impose a tax on gross receipts from interstate commerce. So far as this question is concerned, the essential facts of the *Puget Sound* case are: (1) the taxpayer was engaged in an activity found by the Court to be in interstate commerce; and (2) the taxpayer's activity was confined wholly to the territorial limits of the taxing State, and the gross receipts taxed were derived from this wholly local activity. The *Puget Sound* case held the tax barred by the Commerce Clause.

The sum and substance of the *Puget Sound* decision is that persons engaged in a wholly local business in or connected with interstate commerce may not be subjected by the States to a tax on gross receipts from that business. Thus, the Court said (302 U. S., at p. 94):

> "The business of loading and unloading being interstate or foreign commerce, the state of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. * * * The fact is not important that appellant does business as an independent contractor as long as the business that it does is commerce immune from regulation by the states. What is decisive is the nature of the act, not the person of the actor."

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* This is indicated by the fact that although the Court of Appeals accepted and followed the doctrines of the *Western Live Stock* and later cases above cited, in *O'Kane* v. *State of New York*, 283 N. Y. 439 (1940), and *Matter of Olive Coat Co.* v. *McGoldrick*, 287 N. Y. 769 (1942), the latter case involving the same New York City general business tax law as is here involved, it did not do so in the case at bar.

***Puget Sound* holding is irreconcilable with later decisions**

This position has been completely discarded by this Court in its later decisions. (See cases cited p. 12, *supra*). The views of this Court as expressed in these later cases are stated as follows in *Gwin, White & Prince, Inc.* v. *Henneford, supra* (305 U. S., at pp. 438-439):

> "It has often been recognized that 'even interstate business must pay its way' by bearing its share of local tax burdens, * * * and that in consequence not every local tax laid upon gross receipts derived from participation in interstate commerce is forbidden. See *Western Live Stock* v. *Bureau of Revenue, supra*, and cases cited. But it is enough for present purposes that under the commerce clause * * * State taxation, whatever its form, is precluded if it discriminates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state. Such a tax, at least when not apportioned to the activities carried on within the state * * * burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject."

The law as thus laid down represents the repeatedly expressed views of this Court in an unbroken line of decisions and opinions in later cases from *Western Live Stock* v. *Bureau of Revenue, supra*, in 1938, to *International Harvester Company* v. *Dept. of Treasury, supra*, in 1944. The holding of the *Puget Sound* case is utterly irreconcilable with the law as established by these later cases. In this connection reference is also made to comments on the *Puget Sound* case in LOCKHART, *Gross Receipts Taxes on Interstate Transportation and Communication*, 57 Harv. L. Rev. 40 (1943), 64-65, 82.

***Puget Sound* case is in effect overruled by the later cases relied on by petitioners**

The *Puget Sound* case, by contrast, has never been relied upon by this Court as authority for any of its subsequent decisions, and has in effect been overruled by the later cases. Its present ineffective status as precedent is markedly illustrated by the treatment accorded it by this Court in *Gwin, White & Prince, Inc.* v. *Henneford, supra,* which involved the very same Washington tax (Washington Laws 1935, c. 180) as had been before this Court in the *Puget Sound* case. Moreover, the taxpayer in the *Gwin, White & Prince* case, a company which marketed in other States and foreign countries fruit grown by Washington growers, was engaged, as was the Puget Sound Stevedoring Company, in a service "in aid of the shipment and sale of merchandise in that [interstate] commerce * * * [which] services are within the protection of the commerce clause * * *" (305 U. S. at p. 437).

The taxpayer in that case relied upon and cited the *Puget Sound* case. This Court in the *Gwin, White & Prince* case, in reaching the same result of invalidity as in the *Puget Sound* case, did not in its opinion even mention the *Puget Sound* case. That the *Puget Sound* case was rejected as authority by this Court is further indicated by the fact that Justices BUTLER and MCREYNOLDS, who concurred in the result of invalidity in the *Gwin, White & Prince* case, based their conclusion upon the doctrines of the *Puget Sound* case, and cited that case. However, as stated, the majority of this Court, without mentioning the *Puget Sound* case, cited and relied upon the doctrines of the cases upon which petitioners herein rely.

The only inference that can be drawn from these facts is that this Court rejected the *Puget Sound* case as controlling authority, and instead adopted and applied to the *Gwin, White & Prince* case, the principles and rationale it had enunciated and applied in the earlier *Western Live Stock* and *Adams Mfg Co.* cases, *supra.* It has repeatedly done so in other cases decided since that time. *McGoldrick*

v. *Berwind-White Coal Mining Co., supra; Dept of Treasury* v. *Ingram-Richardson Mfg. Co., supra; Allied Mills, Inc.* v. *Dept. of Treasury, supra; International Harvester Co.* v. *Dept. of Treasury, supra.* Under the circumstances the *Puget Sound* case has been in effect overruled.

The only other question remaining is whether the tax in the case at bar meets the test of validity under the Commerce Clause as laid down in the *Western Live Stock* and the other cases which petitioners cite and rely upon.

POINT II

The New York City general business tax as applied to respondent's receipts is not barred by the Commerce Clause, since it is not an unconstitutional burden on interstate commerce.

Under the recent cases cited at page 12, *supra*, wherein this Court set forth the applicable principles for determining the validity of State gross receipts taxes under the Commerce Clause, it is settled that: (1) persons doing business in, or connected with interstate or foreign commerce, are not immune from all taxes on their gross receipts; (2) such taxes are invalid under the Commerce Clause only if they discriminate against interstate commerce or result in the possibility of cumulative multiple tax burdens merely because interstate business is being done; (3) the possibility of cumulative multiple tax burdens is avoided as to such taxes by basing the tax either on the receipts from the particular activity locally carried on or, if the activity extends beyond State lines, upon a portion of the over-all gross receipts determined by formula to be commensurate with the activity locally carried on.

On the basis of these principles the tax at bar is clearly valid. It is not discriminatory; it is properly commen-

surate with activity carried on locally; and there is no possibility of cumulative multiple tax burdens.

There is no discrimination

The tax here involved is a general business tax. It applies without discrimination to all persons who are carrying on business within the City. The same rate of tax is imposed upon all persons and the same tax base—gross receipts—is used for all persons. The tax does not apply only to persons engaged in interstate and foreign commerce, nor does it apply to such persons at a higher rate or in any respect more onerously than to persons engaged in purely domestic business. The lack of discriminatory intent and the scrupulous regard for the right of persons engaged in interstate and foreign commerce is manifested by the special provision requiring that where taxation of a receipt in its entirety is barred by the Constitution, a proper apportionment shall be made. There can be no question, therefore, that there is no discrimination either as against persons engaged in foreign and interstate commerce generally or against this taxpayer in particular.

The tax is commensurate with the taxpayer's local activity

The receipts here in question arise out of the respondent's wholly local business activity. No part thereof is earned or contributed to by any activity outside the City. Hence, no allocation or apportionment is required to avoid the possibility of undue burden or multiple taxation, for it is clear that these receipts properly reflect the activity, and only the activity carried on within the City of New York. A tax, therefore, based upon these receipts is obviously commensurate with the respondent's local activity within the City of New York and cannot in any way be ascribed to, or regarded as being reflective of, any extra-city activity. The fact that this activity is in interstate commerce or that the receipts arise out of participation

in interstate commerce does not bar the tax. See cases cited page 12, *supra*. See also quotation from *Gwin, White & Prince, Inc.* v. *Henneford, supra,* at page 14, *supra*. "Even interstate business must pay its way," *Western Live Stock* v. *Bureau of Revenue, supra,* p. 254; *Gwin, White & Prince, Inc.* v. *Henneford, supra,* p. 438.

There is no possibility of an undue or multiple burden on interstate commerce

The tax here involved does not impose any affirmative impediment to the conduct of interstate business. The carrying on of such business is not conditioned upon the payment of the tax. No licensing requirement is imposed by the law. Failure to pay the tax does not bar a person from carrying on his business or from engaging in business activity within the City.

In the case at bar there is no possibility of a burden of cumulative multiple taxation. The respondent is engaged in business only in the City of New York. It has no place of business elsewhere. It has no property elsewhere. The services from which the receipts sought to be taxed arise are performed wholly within the territorial limits of the City. It is, therefore, impossible for the tax here involved to be a burden "of such a nature as to be capable, in point of substance, of being imposed * * * or added to * * * with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it [taxpayer] would bear cumulative burdens not imposed on local commerce" (*Western Live Stock* v. *Bureau of Revenue, supra,* pp. 255-256).

Unless the tax at bar is sustained, this respondent and persons similarly situated who engage or participate locally in activities in interstate commerce will be absolved from payment of any tax on gross receipts. The effect of this, of course, will be to impose a heavier tax burden upon persons engaged in local business not regarded as in

interstate commerce, though the benefits, advantages and services afforded by the City are enjoyed equally by both groups of persons. While the Commerce Clause may be used to prevent the imposition of undue and multiple burdens upon persons engaged in interstate commerce, it is surely not intended to absolve such persons from paying a just share of the cost of local government and to impose a heavier burden upon persons not engaged in interstate commerce.

CONCLUSION

The Commerce Clause does not require that gross receipts from interstate commerce be exempt from local taxes. Such taxes are permissible if based upon gross receipts arising out of an activity carried on wholly within the taxing jurisdiction or, where the activity extends beyond State lines, upon such part of the receipts as is fairly commensurate with the activity locally carried on. Such a tax, either on gross receipts resulting from a wholly local activity, or from an allocable portion of the gross receipts if the activity extends beyond State lines, is not an undue burden on interstate commerce, since it cannot in point of substance be imposed by any other State.

The tax at bar is properly commensurate with a wholly local activity and is one which cannot be duplicated in any other jurisdiction. It is one that is imposed without discrimination of any kind. Therefore, this tax is not barred by the Commerce Clause.

Moreover, persons engaged in interstate commerce should be required to pay their way by contributing their share toward the cost of local government, whose benefits and services they enjoy. Local business men not in interstate commerce should not be forced to bear extra tax burdens for benefits and services which they enjoy on a parity with their fellow business men engaged in interstate commerce,

because the latter are absolved from the payment of their share of the cost of providing such benefits and services.

The petition for certiorari should be granted.

Dated: New York, N. Y.
October 17, 1945.

Respectfully submitted,

IGNATIUS M. WILKINSON,
ISAAC C. DONNER,
Counsel for Petitioners.

HARRY KATZ,
of Counsel.

APPENDIX A

Provisions of Local Law

LOCAL LAWS OF THE CITY OF NEW YORK

FOR THE YEAR 1940

No. 78

A LOCAL LAW to amend the administrative code of the city of New York, in relation to raising revenue for the purpose of relieving the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by re-enacting and imposing a tax upon the privilege of carrying on or exercising, for gain or profit, within the city of New York, any trade, business, profession, vocation, commercial activity or financial business, or of making sales to persons within such city, and extending the time during which such tax shall be imposed.

Became a law June 29, 1940, with the approval of the Mayor. Passed by the local legislative body of the city of New York.

Be it enacted by the Council as follows:

Section 1. Title R of chapter forty-one of the administrative code of the city of New York, as added by local law number one hundred three for the year nineteen hundred thirty-nine, is hereby amended to read as follows:

Appendix A

TITLE R

General Business and Financial Tax

§R41-1.0. **Definitions.** When used in this title the following terms shall mean or include:

1. "Person." Includes an individual, partnership, society, association, joint stock company, corporation, estate, receiver, trustee, assignee, referee or any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, and any combination of individuals carrying on or exercising for gain any trade, business, profession, vocation, or commercial activity within the city.

2. "Financial business." The services and transactions of private banks, private bankers, dealers and brokers in money, credits, commercial paper, bonds, notes, securities and stocks, monetary metals, factors, and commission merchants, and where the comptroller shall so determine as a fact, dealers in merchandise where the spread or difference between the cost of goods sold and the sale price is analogous to or in the nature of a commission and does not in any event exceed three percentum of the cost of goods sold, and such determination of fact by the comptroller shall be final.

3. "Receipts." The gross receipts received in, or by reason of any sale made or services rendered or commercial or business transaction had in the city, including cash, credits and property of any kind or nature, without any deductions therefrom on account of the cost of the property sold, the cost of materials used, labor or service or other cost, interest or discount paid, or any other expense whatsoever, but shall not include receipts from the sales, services or transactions hereinafter in schedule A specified.

Appendix A

For the purpose of determining receipts from the business of insurance, such receipts shall be taken to mean receipts from premiums received from risks in the city, whether by mutual or stock companies, domestic or foreign, without any deductions therefrom for any cost or expense whatsoever. The comptroller shall determine from such data as he shall require from insurance companies subject to the provisions of this title, the amount of such receipts and shall ascertain the amount of the tax in accordance with such determination. The business of insurance shall not be deemed to be a financial business.

SCHEDULE A

Receipts of the city and state of New York and of the government of the United States, only in so far as the receipts of the United States are immune from local taxation under the constitution of the United States.

Receipts of charitable and religious corporations or associations whose income is exempted from taxation under the laws of the state of New York.

Receipts of national banking associations, banks, trust companies and mutual savings banks subject to the provisions of articles three, five, six and seven of the banking law of the state of New York.

Receipts of co-operative corporations organized under the provisions of the co-operative corporations laws of the state of New York, or agricultural co-operatives organized under the authority of the federal government.

Receipts from sales of real estate and/or rents derived from real estate.

Receipts of public utility corporations, if otherwise taxed on gross income or receipts pursuant to the authority granted by chapter eight hundred seventy-three of the laws of nineteen hundred thirty-four, as amended.

Appendix A

Receipts of a non-profit membership corporation for the purpose of holding a world's fair and confining its operations solely to preparing for and conducting such fair.

Wages and salaries of individuals.

4. "Gross income." The total amount of receipts of a person engaged in a financial business, excluding the cost of property sold, or moneys or credits received in repayment of advances, credits and loans, but not to exceed the principal amount thereof and excluding deposits.

5. "Exercising any profession, vocation, trade, business or commercial activity." Does not include labor or services rendered by an individual for a wage or salary.

6. "Comptroller." The comptroller of the city.

7. "Treasurer". The treasurer of the city.

§R41-2.0. **Imposition of tax.** a. For the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial business, or of making sales to persons within such city, for each of the periods of one year, or any part thereof, beginning on July first of the years nineteen hundred thirty-nine and nineteen hundred forty, every person shall pay an excise tax which shall be equal to one-tenth of one percentum upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the calendar year in which such period shall commence, or as provided in subdivision e hereof; and for the privilege of carrying on any financial business, as defined in subdivision two of section R41-1.0 of this title, for gain or profit within the city for each of the periods of one year, or any part thereof, beginning on July first of the years nineteen hundred thirty-nine and nineteen hundred forty, every person shall pay an excise

tax which shall be equal to one-fifth of one percentum upon all gross income received in and/or allocable to the city received from such financial business carried on by him in the city during the calendar year in which such period shall commence, or as provided in subdivision c hereof. However, there shall be no tax imposed on those trades, businesses, professions, vocations or commercial activities where the gross receipts do not exceed ten thousand dollars per annum, and no return need be filed.

b. Where a receipt in its entirety cannot be subjected to the tax imposed by this title by reason of the provisions of the constitution of the United States or any other provision of law, the comptroller shall establish rules and regulations and/or methods of allocation and evaluation to the end that only that part of such receipt which is properly attributable and allocable to the doing of business in the city shall be taxed hereunder. The comptroller may make such allocation, with due regard to the nature of the business concerned, on the basis of mileage, division of the receipt according to the number of jurisdictions in which it may be taxed, the ratio of the value of the property or assets of the taxpayer owned and situated in the city to the total property or assets of the taxpayer wherever owned and situated and/or any other method or methods of allocation other than the foregoing calculated to effect a fair and proper allocation in accordance with the purposes of this provision.

c. If a person subject to the tax imposed by this title was not engaged in carrying on a profession, vocation, trade, business or commercial activity or financial business in the city during the whole of the calendar year referred to in subdivision a of this section, he shall pay the tax imposed by this title measured by his receipts or gross income, as the case may be, during the period of one year from the date when he became so engaged; and if such person shall not have been so engaged for an entire year prior to June

thirtieth of the year in which the tax imposed by this title becomes due and payable, then measured by his receipts or gross income for the period during which he was so engaged.

d. If any person liable for the tax after July first, nineteen hundred thirty-nine, acquired the assets or franchises of, or was merged or consolidated with another person, the person liable for the tax shall report as its receipts or gross income by which the tax is to be measured, the receipts or gross income of such other person together with its own receipts or gross income as provided in this section.

§R41-3.0. **Presumption and burden of proof.** For the purpose of the proper administration of this title and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts are a proper measure of the tax until the contrary is established, and the burden of proving that any payment or consideration received by any person subject to the tax hereby imposed was not received in or by reason of a sale made or service rendered or transaction had in the city shall be upon the person who received it.

§R41-4.0. **Filing of returns.** Every person subject to tax under this title shall on or before the fifteenth day of June of the years in which the one-year periods referred to in subdivision a of section R41-2.0 of this title shall end, file a return under oath with the treasurer, except that any person required to file a return for a period beyond the first day of May of any such year may file such return on or before the first day of August thereof. The comptroller, if he deems it necessary to insure the payment of the tax hereby imposed, may require returns of receipts from other persons. The forms of such returns shall be prescribed by the comptroller and shall contain such information as he may deem necessary for the proper administration of this title; and the comptroller or treasurer or their duly author-

ized agents or employees shall be empowered to require supplemental returns and to inspect the books and records of any person as defined in this title pertaining to his receipts. Whenever the treasurer shall require supplemental returns, he shall promptly notify the comptroller thereof.

§R41-5.0. **Payment of tax.** At the time of filing a return as required by this title each person shall pay to the treasurer the tax imposed by this title. Such tax shall be due and payable on the last day on which such return is required to be filed, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of the tax due.

§R41-6.0. **Determination of tax.** If a return required by this title is not filed or if a return when filed is incorrect or insufficient, and the maker fails to file a corrected or sufficient return within twenty days after the same may be required by notice from the comptroller and treasurer they shall determine the amount of the tax due from such information as may be obtainable or on the basis of external indices, such as the number of employees of the person concerned, rentals paid by him, his stock on hand and or other factors. Notice of such determination shall be given to the person liable for the payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed shall, within thirty days, apply to the comptroller for a hearing on such determination, or unless the comptroller and treasurer shall of their own motion redetermine such tax. After such hearing the comptroller shall give notice of his decision to the person liable for the tax. The determination of the comptroller shall be reviewable for error, illegality, unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the Civil Practice Act if instituted within thirty days after the giving of the notice of such

determination. Such proceeding shall not be instituted unless the amount of any tax sought to be reviewed with interest and penalties thereon, if any, shall have first been deposited with the treasurer and an undertaking filed with the comptroller in such amount and with such sureties as a justice of the Supreme Court shall approve, to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of the proceedings.

§R41-7.0. **Refunds.** In the manner herein provided the treasurer upon the order of the comptroller shall refund any tax, interest or penalty erroneously, illegally or unconstitutionally collected by or paid to him, under protest in writing, stating in detail the ground or grounds of the protest, if application to the comptroller therefor shall be made within one year from the payment thereof. For like cause and within the same period a refund may be so made on the initiative and order of the comptroller. Whenever a refund is made by the treasurer, pursuant to the order of the comptroller on the comptroller's own initiative or after a hearing by the comptroller as herein provided, the comptroller shall state his reasons for the refund in writing. A person shall not be entitled to a hearing in connection with such application for a refund if he has already had a hearing or had been given the opportunity of a hearing as provided in section R41-6.0 of this title. No refund shall be made of a tax, interest or penalty paid pursuant to a determination of the comptroller as provided in section R41-6.0 of this title, unless the comptroller, after a hearing as in said section provided, or of his own motion, shall have reduced the tax or penalty, or it shall have been established in a proceeding, pursuant to article seventy-eight of the Civil Practice Act that such determination was erroneous, illegal, unconstitutional or otherwise improper, in which event a refund with interest shall be made as pro-

vided upon the determination of such proceeding. An application to the comptroller for a refund made as herein provided shall be deemed an application for a revision of any tax, interest or penalty complained of and the comptroller shall receive evidence with respect thereto. After making his determination the comptroller shall give notice thereof to the person interested who shall be entitled to maintain a proceeding under article seventy-eight of the Civil Practice Act to review such determination if instituted within thirty days after such determination and an undertaking shall first be filed with the comptroller in such amount and with such sureties as a justice of the Supreme Court shall approve, to the effect that if such order be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding.

§R41-8.0. **Reserves.** In cases where the taxpayer has paid any tax, interest or penalty under written protest stating in detail the ground or grounds therefor, has applied for a refund and has instituted proceedings under article seventy-eight of the Civil Practice Act to review a determination adverse to him on his application for refund, or has deposited the amount of tax assessed in connection with proceedings under section R41-6.0 of this title, the comptroller shall set up appropriate reserves to meet any decision adverse to the city.

§R41-9.0. **Remedies exclusive.** The remedies provided by sections R41-6.0 and R41-7.0 of this title shall be the exclusive remedies available to any person for the review of tax liability imposed by this title; and no determination or proposed determination of tax or determination on an application for refund shall be enjoined or reviewed by an action for declaratory judgment, an action for money had and received, or by any legal or equitable action or pro-

ceeding other than proceedings under article seventy-eight of the Civil Practice Act; provided, however, that a taxpayer may proceed by declaratory judgment if he institutes suit within thirty days after a deficiency assessment is made and pays the amount of the deficiency assessment to the treasurer prior to the institution of such suit and posts a bond for costs as provided in section R41-6.0 of this title.

§R41-10.0. **Proceedings to recover tax.** a. Whenever any person shall fail to pay any tax, penalty, or interest imposed by this title as therein provided, the corporation counsel shall, upon the request of the comptroller or treasurer, bring an action to enforce payment by the taxpayer, who shall be personally liable for the same. If, however, the treasurer in his discretion believes that a taxpayer subject to the provision of this title or of articles eight to twelve inclusive of title E of chapter forty-one of the code is about to cease business, leave the state or remove or dissipate the assets out of which the tax, interest or penalties might be satisfied and that any such tax, interest or penalty will not be paid when due, he may declare such tax, interest or penalty to be immediately due and payable and may issue a warrant immediately.

b. As an additional or alternative remedy the treasurer may issue a warrant, directed to the sheriff of any county within the city, commanding him to levy upon and sell the real and personal property of such person which may be found within his county, for the payment of the amount thereof, with any penalties, interest and the cost of executing the warrant and to return such warrant to the treasurer and to pay him the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant, file with the clerk of his county a copy thereof and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the

tax, penalties and interest for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real and personal property of the person against whom the warrant is issued. The sheriff shall then proceed upon the warrant in the same manner and with like effect as that provided by law in respect to executions against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees which he may collect in the same manner. In the discretion of the treasurer a warrant of like terms, force and effect may be issued and directed to any officer or employee of the department of finance, and in the execution thereof such officer or employee shall have all the power conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the treasurer may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city had recovered judgment therefor and execution thereon had been returned unsatisfied.

§R41-11.0. **General powers of the comptroller.** In addition to the powers granted to the comptroller in this title, he is hereby authorized and empowered:

1. To make, adopt and amend rules and regulations appropriate to the carrying out of this title and the purposes thereof;

2. To request information from the tax commission, superintendent of banks, superintendent of insurance and other agencies of the state of New York or treasury department of the United States, relative to any person, and to afford information to such tax commission or such treasury department relative to any person, any other provision in this title to the contrary notwithstanding;

3. To extend, for cause shown, the time for filing any return for a period not exceeding thirty days; and, in his discretion, to remit penalties, but not interest at the rate of six per cent per annum; and to compromise disputed claims in connection with the taxes hereby imposed;

4. To require all persons doing business in the city to keep such records as he may prescribe;

5. To delegate his functions hereunder to a deputy comptroller or other employee or employees of the comptroller's office and, with the consent of the treasurer, to the treasurer or employees of the department of finance;

6. To determine whether any trade, business, profession, vocation, or commercial activity shall be in whole or in part classified as financial business or otherwise; and in case any trade, business, profession, vocation or commercial activity shall be classified in part as financial business, to set forth the manner of computing the tax hereunder upon each part in accordance with such classification;

7. To prescribe methods for determining the amount of receipts and/or gross income received by reason of any sale made or service rendered or commercial or business transaction had;

8. To prescribe methods for determining allocations of receipts to the city.

§R41-12.0. **General powers of the treasurer.** In addition to the powers granted to the treasurer in this title he is hereby authorized and empowered:

1. To delegate his functions hereunder to a deputy treasurer or other employee or employees of the department of finance; and, with the consent of the comptroller, to the comptroller or any of his employees;

2. To extend, for cause shown, the time of filing any return for a period not exceeding thirty days; and in such event promptly to notify the comptroller of any extensions;

3. To request information from the tax commission, superintendent of banks, superintendent of insurance and other agencies of the state of New York and of agencies of the United States relative to any person; and to afford information to the tax commission and treasury department relative to any person, any other provision of this title to the contrary notwithstanding.

§R41-13.0. **Administration of oaths and compelling testimony.** a. The comptroller or treasurer or his employee duly designated and authorized by them shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of their powers and duties under this title. The comptroller or treasurer shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents to secure information pertinent to the performance of his duties hereunder and of the enforcement of this title, and to examine them in relation thereto, and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

b. A justice of the Supreme Court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the comptroller or treasurer hereunder.

c. Any person who shall refuse to testify or to produce books or records or who shall testify falsely in any material matter pending before the comptroller or treasurer hereunder shall be guilty of a misdemeanor, and punishment

for which shall be of a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

d. The officers who serve the comptroller's or treasurer's summons or subpoena hereunder and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record, except as herein otherwise provided. Such officers shall be the sheriffs of the counties within the city, and their duly appointed deputies.

§R41-14.0. **Penalties and interest.** a. Any person failing to file a return or to pay over any tax to the treasurer within the time required by this title shall be subject to a penalty of five percentum of the amount of tax due, plus interest at the rate of one percentum of such tax for each month of delay or fraction thereof excepting the first month, after such return was required to be filed or such tax becomes due; but the comptroller, if satisfied that the delay was excusable, may remit all or any part of such penalty, but not interest at the rate of six percentum per annum. Such penalty shall be paid and disposed of in the same manner as other revenues from this title. Unpaid penalties and interest may be enforced in the same manner as the tax imposed by this title.

b. Any person and any officer of a corporation or copartnership filing or causing to be filed any return, certificate, affidavit or statement required or authorized by this title which is wilfully false and any person who shall fail to file a return as required under this title, and the officers of any corporation which shall so fail, and any person and any officer of a corporation failing to keep the records required by subdivision four of section R41-11.0 of this title shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or

imprisonment for not more than one year, or both such fine and imprisonment. The certificate of the comptroller or treasurer to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this title shall be prima facie evidence thereof.

§[illegible]-15.0. **Notices and limitations of time.** a. Any notice authorized or required under the provisions of this title may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this title or in any application made by him, or, if no return has been filed or application made, then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this title by the giving of notice shall commence to run from the date of mailing of such notice.

b. The provisions of the Civil Practice Act or any other law relative to limitations of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken by the city to levy, appraise, assess, determine or enforce the collection of any tax, interest or penalty provided by this title. However, except in the case of a wilfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return, provided, that where no return has been filed as provided by law the tax may be assessed at any time.

c. Where, before the expiration of the period prescribed herein for the assessment of an additional tax, a taxpayer has consented in writing that such period be extended, the

amount of such additional tax due may be determined at any time within such extended period. The period so extended may be further extended by subsequent consents in writing made before the expiration of the extended period.

§R41-16.0. **Returns to be secret.** Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the comptroller or treasurer or any officer or employee of the comptroller's office or the department of finance to divulge or make known in any manner the receipts or any other information relating to the business of a taxpayer contained in any return required under this title. The officers charged with the custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the state, the city or the comptroller or treasurer or on behalf of any party to any action or proceeding under the provisions of this title when the returns or facts shown thereby are directly involved in such action or proceeding in either of which events the court may require the production of, and may admit in evidence, so much of said returns or of the fact shown thereby, as are pertinent to the action or proceeding and no more. Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return filed in connection with his tax nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns and the items thereof, or the inspection by the corporation counsel of the city or other legal representatives of the city of the return of any taxpayer who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted for the collection of a tax or penalty. Returns shall be preserved for three years and thereafter until the comptroller orders them to be destroyed.

Appendix A

§R41-17.0. **Separability.** If any provision of this title, r the application thereof to any person or circumstances is, eld invalid, the remainder of this title, and the application f such provisions to other persons or circumstances shall ot be affected thereby.

§R41-18.0. **Construction and enforcement.** This title hall be construed and enforced in conformity with chapter ight hundred seventy-three of the laws of nineteen hun-ired thirty-four as amended, pursuant to which it is en-cted.

§2. This local law shall take effect July first, nineteen undred forty.

APPENDIX B

Provisions of State Enabling Act

LAWS OF NEW YORK

1940

CHAPTER 245

AN ACT to amend chapter eight hundred and seventy-three of the laws of nineteen hundred thirty-four, re-entitled by chapter six hundred and fifty-nine of the laws of nineteen hundred thirty-nine, "An act to enable, temporarily, any city of the state having a population of one million inhabitants or more to adopt and amend local laws, imposing certain specified types of taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment, to provide for the review of such taxes, and to limit the application of such local laws," in relation to authorizing specified types of taxes for relief and welfare and providing for the review thereof

Became a law March 30, 1940, with the approval of the Governor. Passed, on message of necessity, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Sections one and two of chapter eight hundred and seventy-three of the laws of nineteen hundred thirty-four, re-entitled by chapter six hundred and fifty-nine of the laws of nineteen hundred-thirty-nine "An act to enable, temporarily, any city of the state having a population of one million inhabitants or more to adopt and amend local laws, imposing certain specified types of taxes which the legislature has or would have power and authority to im-

pose to relieve the people of any such city from the hardships and suffering caused by unemployment, to provide for the review of such taxes, and to limit the application of such local laws," as last amended by chapter six hundred and fifty-nine of the laws of nineteen hundred thirty-nine, are hereby amended to read as follows:

Section 1. Notwithstanding any other provisions of law to the contrary, any city of the state having a population of one million inhabitants or more acting through its local legislative body, is hereby authorized and empowered until July first, nineteen hundred forty-one to adopt and amend local laws imposing in any such city any or all of the following types of taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment; such taxes to be collected and administered by the fiscal officers of such city in the same manner as other taxes which are now collected and administered by such officers in accordance with the charter or administrative code of any such city: (a) Taxes on the use, sale, exchange, transfer, storage, withdrawal, retention, installation or license to use or consume tangible personal property, other than, on or after July first, nineteen hundred forty, cigarettes.

(b) Taxes on the privilege of doing any business, engaging in any trade, calling, occupation or profession; owning, holding or occupying any property; possessing or exercising any franchise or franchises; or on the gross receipts from sales to persons within such city.

(c) Taxes on the sale or performance of services including utility services but excluding professional services.

The tax or taxes imposed pursuant to such local laws shall be effective only during the period commencing when this act becomes effective and ending July first, nineteen

hundred forty-one, or any portion of such period. A tax imposed hereunder shall have application only within the territorial limits of any such city and shall be in addition to any and all other taxes.

This act shall not authorize the imposition of a tax on incomes or upon the transfers of estates of deceased persons, or upon the gross income from the operation of hotels, multiple dwellings or office buildings by persons in the business of operating or leasing sleeping or parlor railroad cars or of operating railroads other than street surface, rapid transit, subways and elevated railroads, or upon gross incomes or gross operating incomes of persons subject to taxation under the provisions of section one hundred eighty-six-a of the tax law, except in accordance with the provisions of section twenty-b of the general city law; or upon interest or dividends received from a corporation by a person referred to in this paragraph.

This act shall not authorize the imposition of a tax on any transaction, originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits.

This act shall not authorize the imposition of a tax on a non-resident of such city or on account of any transaction by or with a non-resident of such city, except when imposed without discrimination as between residents and non-residents, on account of tangible property actually located or income earned, or trades, businesses or professions carried on within such city, or on account of transfers, retail sales or other transactions actually made or consummated within such city by a non-resident while within such city. A corporation shall not be deemed a non-resident by reason of the fact its principal place of business is not within the city.

Except as expressly otherwise in this act provided, nothing herein contained shall limit or prevent the imposition

f a tax on gross incomes or a tax on gross receipts of persons, firms and corporations doing business in any such ity.

No such person, firm or corporation, however, shall be ubject to the imposition of more than one tax by any such ity on gross income or gross receipts for the privilege of oing business under the provisions of this act.

A person who has a permanent place of abode without uch city and lives more than seven months of the year out f such city shall be deemed a non-resident within the mean ng of this act.

Any final determination of the amount of any tax payble hereunder shall be reviewable for error, illegality or nconstitutionality or any other reason whatsoever by a roceeding under article seventy-eight of the civil practice ct if application therefor is made to the supreme court ithin thirty days after the giving of the notice of such inal determination, provided, however, that any such proceeding under article seventy-eight of the civil practice ct shall not be instituted unless the amount of any tax ought to be reviewed, with such interest and penalties hereon as may be provided for by local law or regulation, hall be first deposited and an undertaking filed, in such mount and with such sureties as a justice of the supreme ourt shall approve to the effect that if such proceeding be ismissed or the tax confirmed the petitioner will pay all osts and charges which may accrue in the prosecution of uch proceeding.

Where any tax imposed hereunder shall have been erroneusly, illegally or unconstitutionally collected an applicaion for the refund thereof duly made to the proper fiscal fficer or officers, and such officer or officers shall have made determination denying such refund, such determination hall be reviewable by a proceeding under article seventyight of the civil practice act, provided, however, that such

proceeding is instituted within thirty days after the giving of the notice of such denial, that a final determination of tax due was not previously made, and that an undertaking is filed with the proper fiscal officer or officers in such amount and with such sureties as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of such proceeding.

Except in the case of a wilfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made with respect to taxes imposed under local laws enacted prior to July first, nineteen hundred thirty-eight, after July first, nineteen hundred forty-one, and with respect to taxes imposed under local laws enacted subsequent to July first, nineteen hundred thirty-eight, after the expiration of more than three years from the date of the filing of a return, provided however, that where no return has been filed as provided by law the tax may be assessed at any time.

§ 2. Revenues resulting from the imposition of taxes authorized by this act shall be paid into the treasury of any such city and shall not be credited or deposited in the general fund of any such city, but shall be deposited in a separate bank account or accounts and shall be available and used solely and exclusively for paying the principal amount of any installment of principal and of interest due during the aforesaid period on account of the ten-year serial bonds sold to obtain moneys to pay for home relief and work relief in any such city in the month of November, nineteen hundred thirty-three; for defraying the cost of collecting and administering such taxes, but not in excess of such cost, during the year immediately preceding; and for the relief purposes for which such taxes have been imposed under the provisions of this act.

Appendix B

Notwithstanding the foregoing limitations, a sum not to
xceed four million five hundred thousand dollars may be
pended for old age assistance by any such city from the
xes imposed and collected hereunder prior to the first day
f July, nineteen hundred forty.

Such legislative body may authorize the performance of
ublic work for the relief purposes aforesaid to be paid for
t of the tax or taxes imposed under this act and which
ay be undertaken other than by contract by such municipal
rporation, during the period aforesaid, through and un-
r its welfare or other department.

The provisions of this act shall be effective notwithstand-
g any provisions contained in any charter, or in any gen-
ral, special or local laws to the contrary, and notwithstand-
g any such provisions therein contained requiring such
ork as may be undertaken to be let by contract.

§ 2. This act shall take effect immediately.

APPENDIX C

Provisions of Article 2-B of General City Law (Enabling Act for Local Law No. 47 of 1941)

LAWS OF NEW YORK

1941

Chapter 199

AN ACT to amend the general city law, to enable certain cities to impose and collect taxes on certain businesses

Became a law March 28, 1941, with the approval of the Governor. Passed, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter twenty-six of the laws of nineteen hundred nine, entitled "An act in relation to cities, constituting chapter twenty-one of the consolidated laws," is hereby amended by adding thereto a new article, to be article two-B, to read as follows:

ARTICLE 2-B

GENERAL BUSINESS AND FINANCIAL TAX AUTHORIZATION

Section 24-a. Certain cities authorized to impose taxes on certain businesses

24-b. Authority to impose other taxes; limitations.

24-c. Revenues; disposition of.

§ 24-a. **Certain cities authorized to impose taxes on certain businesses.** Notwithstanding any other provisions of law to the contrary, any city having a population of one million or more, acting through its local legislative body, until July first, nineteen hundred forty-four, shall have

power to adopt and amend local laws imposing in any such city a tax upon persons carrying on or exercising for gain or profit within such city, any trade, business, profession, vocation or commercial activity, other than a financial business, or making sales to persons within such city, measured by the gross receipts from such activities carried on or sales made within the city, but not to exceed one-twentieth of one per centum of such gross receipts, and upon persons carrying on within any such city, any financial business, measured by the gross income from such financial business carried on within such city, but not to exceed one-tenth of one per centum of such gross income. In any such city in which the functions of the chief fiscal officer are divided between two or more officials, any such local law may assign the respective functions of each such official in assessing and collecting the tax. Every such local law in terms shall be, substantially, as follows:

GENERAL BUSINESS AND FINANCIAL TAX

(NOTE:—*Here follows the prescribed model law which is practically verbatim the provisions of the local law [Title R of the Administrative Code of the City of New York] set forth in Appendix A, pages 22 to 37,* supra.)

§24-b. **Authority to impose other taxes; limitations.** Nothing in this article contained shall limit the power of any city to adopt or amend local laws imposing the tax authorized by section twenty-b of this chapter, as amended, or by chapter eight hundred seventy-three of the laws of nineteen hundred thirty-four, as amended.

Nothing in this article contained shall be construed to refer to or authorize a tax such as is authorized to be imposed by subdivision b of section one of chapter eight hundred seventy-three of the laws of nineteen hundred thirty-four, as last amended, upon (a) the gross income of persons subject to the supervision of either division of the department of public service; (b) the gross income of persons engaged in the business of operating or leasing sleeping

and parlor railroad cars or operating railroads other than street surface, rapid transit, subway and elevated railroads; (c) the gross operating income of persons engaged in the business of operating omnibuses with a carrying capacity of more than seven persons who are not subject to the supervision of either division of the department or public service; (d) the gross income of persons constructing, owning, operating, managing or leasing electrical subways, conduits, ducts, subsidiary connections or similar structures and equipment upon, above, or under any public or private street, public or private avenue, highway, public or private place, road or ground in any such city, through which are run electrical conductors, either low or high tension, by itself, or by any person engaged in the business of affording telephonic or telegraphic communication for hire or in the business of manufacturing, generating, distributing or transmitting electricity; or (e) the gross operating income of persons not subject to the supervision of either division of the department of public service but furnishing or selling gas, electricity, steam, water, refrigeration, telephony or telegraphy, or furnishing or selling gas, electric, steam, water, refrigeration, telephone or telegraph service, or operating omnibuses (whether or not such operation is on the public streets), regardless of whether such furnishing or selling or operation constitutes the main activity of such person or is merely incidental thereto.

§24-c. **Revenues; disposition of.** Revenues resulting from the imposition of taxes authorized by this article two-b shall be paid into the treasury of the city imposing the same and may be credited to or deposited in the general fund of such city.

§2. Article two-b of such chapter, as added by chapter five hundred and two of the laws of nineteen hundred twenty-one, as amended by chapter six hundred and four of the laws of nineteen hundred twenty-three is hereby renumbered to be article two-c.

§3. This act shall take effect immediately.